IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1951

No. 1

GEORGIA RAILROAD & BANKING CO.,
Appellant,
vs.
CHARLES D. REDWINE,
State Revenue Commissioner,
Appellee

BRIEF AMICI CURIAE FOR APPELLEE

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This case is of *such vital importance* to the Counties, municipalities and school districts through which the railroad runs which is sought to be taxed, that we respectfully request that we be permitted to file this supplementary brief.

It is the small taxpayers of these governmental subdivisions which are having to bear all the burdens of government, this being the only railroad lying in most of the subdivisions, and hence being, in most cases, the only large property owner. Because of this, we urgently pray this court to consider most carefully the prayers of these subdivisions, that this corporation be required to bear its pro rata share of the burdens.

SUPPLEMENTARY STATEMENT OF CASE

Since this case has been pending in this court, a decision on the question has been rendered by the Superior Court of the Augusta Circuit. While we do not attempt to say that this Court would be bound in any way by the decision, yet,

Judge Anderson made such an exhaustive study of the tax exemption, that we feel that this court would be interested in reading his reasoning on the issues involved, which he set forth in a lengthy opinion, and which opinion we attach in the Appendix.

Appellee Is A Party In Two Capacities

Appellee in this case is acting in two separate and distinct capacities:

First, as the official charged with assessing the entire value of the taxable property of plaintiff in error and assessing the State taxes thereon;

Second, as the official charged with assessing the taxes due the taxing subdivisions of the State.

In 1874, the Comptroller-General became the official charged with the first of these capacities.

In 1889, the Comptroller-General became the official charged with the second of these capacities. He continued to serve in both these capacities until the State Revenue Commissioner succeeded to these duties.

For many years prior to 1833 and continuing to the present, counties and municipal corporations have been treated as distinct corporations, separate and distinct from the State as entities, charged with the performance of the greater portion of governmental duties, and endowed with a portion of the sovereign powers of the State in order to be able to perform these governmental duties. As for counties, more than one Supreme Court decision had called them corporations or quasi corporations and section 463 of the code of 1861 definitely declared them corporations. Prior to that code, the general laws allowed these counties to tax only their *inhabitants*, corporations not being inhabitants but this code eliminated that limitation. The Constitution of 1868 endowed them with the power to tax property, ad valorem, but no machinery was provided for them by which

they could apply their tax to railroad corporations. Under their charters the municipal corporations likewise were unable to tax such corporations because of the lack of the necessary legal machinery by which to apply their tax.

When the case of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, came on for trial in 1874, the rights of these governmental subdivisions were not in issue and they had no official representative charged with the duty of representing their interests made a party. Having acquired their rights to tax property ad valorem prior to the judgment rendered in this case, they were not privy to the State in that judgment regardless of whether the State was bound or not as res judicata. Hence, they did not have their day in court in that case.

When the case of Georgia Railroad and Banking Company v. Wright, Comptroller-General, 132 Fed. 912, 216 U.S. 420, came on for judgment in 1907, that action being against Wright in his individual capacity and not against him in his official capacity, their rights could not be legally determined. Hence, they did not have their day in court in that case.

Taxability by State and Taxability by Governing Subdivisions Entirely Different Issues

We most earnestly urge this court to consider separately and distinctly the question as to whether the State can tax, from the question as to whether the subdivisions can tax this corporation.

Different principles of law affect each of these taxing entities. One principle or doctrine might affect the State's power to tax or right to enforce the tax, and might not affect the subdivisions. For example, a tax exemption might have been given as to one, and withheld as to the other. Again, the doctrine of res judicata, might be held by the court to apply to one and yet not to the other.

BRIEF OF LAW AND ARGUMENT

Intervenors Not Bound By Prior Decisions

The taxing subdivisions were not parties nor privies in the case of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423. Nor were they legally, parties or privies when the case of Georgia Railroad & Banking Co. v. Wright was decided in 132 Fed. 912, and 216 U. S. 420.

In the first case, there was no effort to tax the company for the governing subdivisions. In the second case, the action was against Wright in his individual capacity, and, hence the subdivisions were not legally parties thereto.

In Mayor, etc. of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724, the Supreme Court held that a subdivision of the State Government as trustee for the interests of the people cannot be bound by litigation to which it was not a party.

50 C.J.S. 336, Section 796 Judgments under the heads of States, Counties and Municipal Corporations points out how far judgments against State or State official bind subordinate political subdivisions and vice versa, and shows conclusively that the subdivisions are not bound under the doctrine of res judicata.

In

Bank of Kentucky v. Kentucky,
207 U.S. 258, 52 L.E., 197,

a case almost identical with this issue in the case at bar, the Supreme Court of the United States conclusively sustains our contentions on this point. In that case Jefferson County was attempting to tax a corporation, which was chartered in 1834, and granted an exemption. State officials provided the machinery for assessing the tax. The corporation pleaded as res judicata a prior decision against state officials involving taxes claimed by Franklin County and the City of Louisville in which the court held that the State had a binding contract with the corporations, by which it exempted the company from state taxes and further held

that it could be taxed for county and municipal purposes only upon its real estate used by it in conducting its business. The court rejected this plea of res judicata and held that:

> "A person or a municipality is not bound by former litigation, unless it was a party, either actually or by its representative."

We, therefore, urge that the decisions in other cases which have heretofore been before the courts should not be binding on these subdivisions, but that, as to them, each issue raised in the present case should be considered as an entirely new question unhampered by previous decisions.

Appellant Estopped by Judgment to Claim A Judgment As to Taxes For One Year Is Res Judicata As to Taxes for Other Years

Under the doctrine of estoppel by judgment, Appellant is bound by the judgment in the case of Georgia Railroad & Banking Company v. Wright, 124 Ga. 596, and by the judgment of the same case in 125 Ga. 589, when it reached the Supreme Court on its merits.

This was a case where the Comptroller-General acting in his dual capacity just as the present Appellee is acting: in his official capacity to collect State taxes, and second, in his official capacity as agent for the collection of the taxes of the Counties and Municipalities, was the defendant and the present Appellant was plaintiff. In this case this company sought to enjoin the collection of taxes due the State and subdivisions on certain stock owned by it. The Comptroller-General pleaded as res judicata a case which had been rendered by the Supreme Court of the United States for taxes due for the year 1900. The present Appellant presented and urged the issue setting up the principle of law that judgments relative to taxes for one year is not res judicata as to actions for taxes for other years. This company prevailed in the decision and the Supreme Court of Georgia concurred as follows:

"2. A suit to enjoin the collection of taxes for one year is no bar to a suit to enjoin similar taxes for another year. This is so because the taxes for each year constitute a separate cause of action." (Lumpkin, J., dissenting.)

It also held

"... neither party is estopped on the question of taxability except for the year 1900."

Three months later when the same case came back to this court as reported in the 125 Ga. 589, this same court said:

"The foregoing discussion disposes of all the questions made in the record, which in our opinion, are not concluded by the former opinion. The rulings in the former decision are affirmed and adhered to. Upon further consideration and reflection, they are altogether satisfactory ..."

"All the Justices concur."

These were two judgments between the identical parties at interest in the present case and the present Appellant in which the last judgment made the first unanimous. It invoked and obtained in its favor and against these parties at interest the very judgments it now attempts to attack. As judgments between the identical parties, the doctrine of estoppel by judgment applies and Appellant is estopped to plead that judgments as to taxes for one year is res judicata as to taxes for other years.

Even though the taxing subdivisions had been bound by the judgment against the State of Georgia in the 54th Georgia, these judgments holding that even though the question of taxability for the year 1900 had been the issue when the case was decided in the United States Supreme Court the same questions of taxability could be again raised in cases involving taxes for other years.

The Supreme Court of the United States most likely rec-

ognized this estoppel when the case of Wright v. Georgia Railroad & Banking Company was before it in 216 U.S. 420 and refused to consider the 54th Georgia res judicata.

The District Court Was Correct In Holding That The Judgment In The 132 Fed. 912 and 216 U.S. 420 Was Not Res Judicata As To Taliaferro County.

Appellant's Counsel did not raise the question in its first brief as to whether Taliaferro County was bound by the decision in the above cases under the doctrine of res judicata, but have done so in their last brief. In answer to their argument we call attention to the fact that the attempt by the authorities of this county to intervene and be made a party in said cases was ultra vires, and any judgment rendered against the county by virtue of such suit was void.

Code Section 23-1502 provides:

"A County is not liable to suit for any cause of action unless made so by statute."

We quote from

Monroe Co. v. Flynt, 80 Ga. 489

". . . counties of the state are political subdivisions, exercising a part of the sovereign power of the state; they cannot be sued except where it is so provided by statute."

As a corollary to the above Code Section, the county authorities have no power to waive that element of sovereignty and consent to a suit on a cause of action against the county not provided by law, any more than did Comptroller-General Wright have any right to bind the State by his pleading in the Federal Court. And, any judgment rendered in such an attempt by the county authorities is void.

There was no provision of law which authorized counties to engage in such litigation relative to taxes, or to ask for a declaratory judgment relative to their rights of taxation.

Specific machinery had been provided for the assessing of tax values of railroads, the levying of taxes by counties, the assessing of these county tax levies by the Comptroller-General, and the litigation relative to these county tax levies, in Code Sections 92-2604, 92-2705 and 92-2706.

The Doctrine of Stare Decisis Does Not Require This Court to Follow 54 Ga. 423 in Determining the Rights of the Counties, Municipalities and School Districts.

The record of the 54th Georgia set forth in Appellant's petition shows that the only evidence introduced was the Act of 1833. Neither the Act of 1835 nor the Act of 1837 was introduced, nor were they considered at all by the Supreme Court in its decisions, as to whether the tax exemption was continued by the Act of 1835, or whether the Act of 1837 provided any tax exemption in perpetuity to the branch from Madison to Atlanta. The decision was limited to a point of law and not binding as stare decisis.

We submit that the decision in the 54th Georgia was a great and glaring error, and this court should not perpetuate such an error by following it. The great Judge Bleckley in

Ellison v. Georgia, 87 Ga. 697, said:

"... the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude, and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim of a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not stare decisis, but *fiat justitia ruat coelum.*"

We, also, quote from 21 C.J.S. 323, Courts Sec. 193:

"Rule not Applied to Perpetuate Error.

"Previous decisions should not be followed to the extent that grievous wrong may result; and, accord-

ingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous.

"The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong be the result."

15 R.C.L. 957 Judgments, Section 433.

". . . the recovery of judgment for a cause of action under an unconstitutional statute in a suit in which the constitutionality of the statute is not brought in question does not estop the party in whose favor the judgment is rendered from setting up the unconstitutionality of the statute in a subsequent action between the same parties upon a different cause of action." Citing Philadelphia v. Ridge Ave. R. Co., 142 Pa. St. 484, 21 Atl. 982.

We quote from 7 Ruling Case Law 1008, 1009, 1010 Courts, Section 35:

"35. Propriety of Departure from Doctrine of Stare Decisis.—If judges were able, conscientious, and infallible; if judicial decisions were never made except upon mature deliberation, and always based upon a perfect view of the legal principles relevant to the question in hand, and if changing circumstances and conditions did not so often render necessary the abandonment of legal principles which were quite unexceptionable when enunciated, the maxim stare decisis would admit of few exceptions. But the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice, and

to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error. . . . If, . . . a decision or series of decisions are clearly incorrect, either through a mistaken conception of the law, or through a misapplication of the law to the facts, and injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases. Hasty or crude decisions should be examined without fear and reversed without reluctance. While it is true that long acquiescence in an erroneous decision, so that it has become a rule of property or practice, may raise it to the dignity of law, yet it must not be understood that a previous line of decisions affecting even property rights can in no case be overthrown . . . where the decision goes to the merit of the controversy, where the whole rights of parties is dependent upon and is governed by it, in such case, if the court should, from any cause, have erred, it is not only proper, but it is an obligatory duty upon them, a duty imperiously demanded by litigants whose rights are before them for adjudication, to re-examine the opinion so pronounced, and, if found to be erroneous, to recede from it. In the matter of constitutional provisions it has been held that while courts recognize to the fullest extent the necessity for the stability, consistency, and a firm adherence to the doctrine of stare decisis in passing upon and construing any provision of the organic law, yet if an error has been committed, and becomes plain and palpable, they will not decline to correct it, even though it may have been reasserted and acquiesced in for many years."

We quote the following from the case of

Hendricksen v. Seaward, 135 F. (2d) 986 of 150 ALR 5:

" . . . Thus in tax controversies of this character, when the courts undertake to bestow on either party

a vested right in an erroneous decision of law, they are apt, by multiplying the issues, merely to add fuel to the controversy. . . ."

The Decision in the 54th Georgia Based on Mistaken Assumptions

The decision in the 54th Georgia was based on the mistaken assumptions that section 15 of the act of 1833 was valid, was constitutional as measured by the Constitution of Georgia, was not ambiguous, that the company had performed all the duties imposed by the charter, and that the Legislature of Georgia had the power to grant tax exemptions in perpetuity, that the exemption applied to all branches of the road.

A very interesting discussion of the subject "Res Judicata Re-Examined," by Edward W. Cleary, is found in the January 1948 issue of the Yale Law Journal. We quote from footnote No. 21, page 342, of the Journal as follows:

> "E.g., Ohio Life Insurance Co. v. Board of Education, 387 Ill. 159, 55 N.E. 2d (1944), where plaintiff in a former action had obtained judgment in the federal district court for interest due on bonds. Subsequently plaintiff sued in the state court for the principal of the bonds and was met with the defense of invalidity of the statute purporting to validate the bond issue. The court pointed out that while the complaint in the first cast relied upon the validating statute, no question was actually raised as to its validity and judgment was entered upon the assumption that the statute was valid. Estoppel was held not to apply.

By reason of this principle of law, the decision of the 54th Georgia could not affect the taxing subdivisions, and more especially those along the branch road from Madison to Atlanta.

It was held in.

Wilmington & W. R. Co. v. Alsobrook, 146 U.S. 279, 13 Sup. Ct. Rep. 72: that

A judgment that a railroad company's franchise and rolling stock are included in an exemption of all its property is not conclusive of the question whether such exemption extends to a branch road.

If the rule for construction of tax exemption statutes as was laid down by the United States Supreme Court in the case of the Atlantic Coast Line Railroad Company v. Phillips, Commissioner, 332 U.S. 168, to-wit:

"A Legislature is not to be presumed to have relinquished its power of taxation beyond the narrowest rational reading of an exemption."

is sound, then we urge that this same rule should apply in the construction of a judgment when the judgment is pleaded as res judicata.

The Supreme Court of Georgia Overrules Former Decisions Holding That Where Tax Exempt Funds Are Invested in Other Property, The Exemption Attaches to Other Property.

The former decisions in the Georgia Supreme Court holding that where stock exempted from taxation by charters was invested in tangible property, this property likewise became exempt, were based on the fallacious theory that the exemption followed the investment and attached to the property in which it was invested. Running throughout the Georgia decisions from the earliest times we find this principle of law strongly in evidence.

However, the case of

City Council of Augusta v. Ransom, 179 Ga. 180, 175 S.E. 497

is a complete about face.

It is now the law of Georgia that tax exempt funds when invested in non-exempt property lose the tax exemption.

As applied to the tax exemption in the case at bar, the plea that the capital stock of this company when it was invested in property used for a railroad became exempt can no longer be sustained as the law of Georgia. Therefore, as against the taxing subdivisions unaffected by decisions to the contrary, in other cases, the Appellant has no tax exemption on property in which the capital stock was invested.

The Stock Tax Limitation in the Act of 1833 Was a State Tax Limitation. Other Taxes Not Prohibited.

The charter of the *Central Railroad & Banking Company* of 1835 provided

> "The railroad and its appurtenances shall not be subject to be taxed higher than ½ of 1 per cent upon its annual income; second, no municipal or other corporation shall have the power to tax the stock of said corporation; third, but such municipal or other corporation may tax any property, real or personal of the said company within the jurisdiction of said corporation in the ratio of taxation of like property."

This act was approved just four days before the act of 1835 amended the charter of the Georgia Railroad and Banking Company was approved, and we think more clearly than anything else shows conclusively that it was in the minds of the legislature in providing for the exemption of stock of the latter corporation merely to limit the state taxation. The Supreme Court of the United States so construed the above exemption in the case of Central Railroad & Banking Company v. Wright, 164 U.S. 327 41 L. E. 454, and is of especial importance in the case at bar respecting the rights of the Counties, Municipalities and School Districts. Mr. Justice Brown begins the opinion with:

> "This case raises the question, frequently presented to this court of the power of the state to impose upon a

corporation a tax not provided for or contemplated, nor yet expressly forbidden, in its original charter" . . .

Referring to the provisions of the above exemption he continues:

" . . . In section 18 of the act of 1835, above cited, there is an express prohibition against the municipal taxation of the 'stock' of the company and an express permission to tax any 'property of the company within the jurisdiction of the corporation . . . *The 1st clause was obviously intended as a limit upon state taxation;* the second as a prohibition upon the powers of municipalities to tax the shares of stock held by its citizens; the third, as an express permission to tax any property of the company within its jurisdiction for local purposes . . . " (Emphasis supplied.)

In Bailey v. Magwire, 89 U.S. 215, 22 L. E. 850, the Supreme Court of the United States construed a tax exemption of a railroad which referred to State taxes but did not mention county and municipal taxation, and held that under such exemption counties and municipalities could tax.

The taxes levied by the counties, municipalities and school districts of today "were not provided for, or contemplated, nor yet expressly forbidden" by the act of 1833 creating the Georgia Railroad Company. As of that date counties and municipalities had been given no power to levy taxes on corporations. They were limited to the taxation of their respective *inhabitants* and a corporation did not come under the category of an inhabitant of a county or municipality, so as to subject the corporation to tax on its stock or its property. The State was the only one that had power to tax corporations and this was fixed at 31¼c per 100 dollars. The corporators knew that such was the law and the legislators exempted them for 7 years from the form of taxes then levied by the State.

If we consider the tax exemption as a contract, then the contracting parties cannot be presumed to have contracted

concerning a tax not even in existence, nor whose future existence was contemplated. As was said by Chief Justice Duckworth in the case of Thompson v. Atlantic Coast Line, 200 Ga. 856; 38 S.E. 2d 774:

> ". . . Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one per cent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent. In failing to make clear such an intent, it is assumed that the legislature intended that the courts apply the rule of construction and restrict the exemption to the limits there stated, and never extend it by writing in something more." . . .

Doubt destroys tax exemption. When the entire section 15 of the Act of 1833 is read in connection with the last sentence, the intention of the legislature is extremely doubtful. Especially so as to whether it was intended that the corporate property should be exempted from ad valorem taxes of the subdivisions in perpetuity when the only exemption provided was an exemption from a State tax, the State at the time alone taxing *stock* of corporations, an intangible tax, the counties and municipalities having no such power.

ERRONEOUS ARGUMENT IN APPELLANTS BRIEF FILED IN SEPTEMBER, 1951

Erroneous Argument Relative to the Madison-Atlanta Branch

We quote the following argument from the Brief of Appellant filed in September 1951, page 38:

> "Moreover, the original charter provided that the 'capital' of Appellant should be subject to tax only as provided in the charter. The courts have held that this meant the property in which the original capital was lawfully invested. Certainly the original capital

was lawfully invested in the Atlanta branch and therefore is subject to the special provisions for tax to the same extent as other property in which the capital was lawfully invested."

Counsel overlooks the fact that this branch was not built with the capital derived from the sale of stock, but was built from the earnings of the other portions of the road. In writing of this particular branch of the road Phillips' History of Transportation, pages 243 and 247 says:

"The passing of the dividends in 1843-1844-1845 was a feature of the extension policy. Very few shares were salable during the hard times. The earnings of the road together with the proceeds of nearly $700,000 in 7 per cent bonds, were all devoted to building the road to Atlanta. The route thither, especially in the neighborhood of Stone Mountain, was more rugged than that in the eastern district and yet was not on the whole unfavorable. The cost of the extension, with a T-rail of about forty pounds to the yard, was estimated at $11,366 per mile, and the actual cost did not greatly exceed the estimate." . . .

(On page 247) "In its early years the company was fortunate in being able to pay as it went. To secure the Atlanta extension, it assumed a bonded debt of $700,000, it is true, which in the following years it increased to above $900,000 for the sake of equipment and road betterments. This burden, however, was not oppressive, upon a railroad of such heavy traffic and high earning capacity; and from 1852 the debt was steadily reduced by moderate appropriations from earnings.

According to this same authority it will be noted the net earnings of the road applied to this branch for the years 1843, 1844 and 1845 as given on page 245 were as follows: 1843, $138,297.00; 1844, $147,532.00; and 1845, $154,538.00; a total of $440,227.00.

This sum added to the $700,000.00 bond issue was not capital stock and we contend has no exemption for that reason.

Intent of Legislature Shown by Charter of Middle Branch Railroad Company

The intent of the legislature not to grant tax exemption to this branch of railroad is conclusively shown in the act of 1836 Prince's Digest, page 368, creating the Middle Branch Railroad Company for the purpose of building a railroad from Madison to Atlanta which provided:

> "Said company shall possess and enjoy all the rights, immunities, and privileges, which are, had, possessed and enjoyed by the Georgia Railroad and Banking Company."

This corporation never accepted the charter and the next year the charter of the Georgia Railroad and Banking Company was amended allowing it to build the road, but with the limitation of the immunities to the *construction* instead generally as in the Middle Branch Railroad Company charter.

The Taxability of the Madison-Atlanta Branch Not Made A Separate Issue in Wright v. Ga. R. R. Co. in the 216th U.S. 420

In that case a separate issue was not raised or argued as to the taxability of the Madison-Atlanta Branch as was that of the Washington Branch. The reasoning applied to the taxability of the Washington Branch shows unquestionably had a separate issue been raised as to the taxability of the Madison-Atlanta Branch in the above case, the Supreme Court would have held that branch taxable also.

Fallacious Argument Relative to the Branch Beyond Athens

We think counsel is in error in their argument, pages 32 and 33 of their brief, relative to the building of the branch beyond Athens.

The preamble of the act of 1835 read as follows:

> "Whereas the people of the west have in contemplation to make a communication between the city of Cincinnati and the Southern Atlantic Coast by means of a railroad: and whereas the best route for said communication is believed to be through the State of Georgia: and whereas the building of the Georgia Railroad is now in progress and will be an important link in the line of said communication."

Section 2 of the act provides:

> ". . . the continuation of said road beyond Athens, so as to connect with the Cincinnati road shall be steadily prosecuted as soon as the company shall have satisfactory evidence that the said connection can be formed."

That the company deliberately failed to construct this railroad as contemplated by the above preamble is clearly brought out in the case of The Union Branch Rail Road Company v. The East Tennessee and Georgia R. R. Co., 14 Ga. 327. We learn from that case that the last named company was incorporated by the State of Tennessee in 1835 and was later built through Tennessee, and in the direction of Cincinnati.

Appellant is still under obligations to build this line.

The following extract from page 229 in Phillips' "History of Transportation in the Eastern Cotton Belt," shows the route which was planned from beyond Athens, Georgia, which has never been built:

> "Beyond Athens an extension was contemplated running just north of Lawrenceville, across the Chattahoochee, between the sources of the Tallapoosa and the Etowah, to the Coosa River and thence to the Tennessee at Decatur, whence a railroad was already reported to be building to the Mississippi at Memphis."

Erroneous Argument as to Eatonton Branch

We call attention of the court to pages 35 and 36 of the Brief of Appellant, referring to the Eatonton Branch, giving as authority the act of 1859. We quote from page 36 of Appellant's brief:

> "... This clearly withdrew the right of the Georgia Railroad & Banking Company to build a branch to Eatonton."

We submit that counsel must have not carefully read the acts of 1833 and 1835 in connection with reading the acts of 1858 and 1859. The acts of 1833 and 1835 required the three branch roads to begin

> "... at the point agreed upon as the termination of the Union road, or such point for the midde road as the stockholders may select; one running to Athens—one to Eatonton. ..."

Union Point was the termination of the Union road. The act of 1858 authorized this company to

> "extend the Eatonton branch of their road from Greensboro or Madison, or from any point between those places to the town of Eatonton."

There is no indication that the company ever accepted the provisions of this act. Apparently, they did not for the very next year the legislature repealed this act, which left the company just where they were before the enactment of the 1858 act—*still obligated to build this railroad from Union Point to Eatonton.*

There is still no railroad from Eatonton to Madison or to Union Point.

Appellant admits its failure to construct the railroads required by the charter. It was the clear intention of the legislature that the company should construct a railroad to Eatonton, and from Athens to the Tennessee line. It gave the company the exclusive right for 36 years, approxi-

mately until 1876, to build the roads contemplated. It gave this company the *exclusive monopoly* for 36 years to construct *all railroads* within 20 miles of this road and these towns. In the charter it repealed an act which would have otherwise given another corporation the right to construct a railroad to Eatonton. The building of these railroads was the purpose for which the corporation was created; the obligation to construct the branch to Eatonton was the moving consideration for the repeal of the act authorizing another corporation to build the road. There can be no room for doubt that it was both expressed and implied in the charter that it was the intention of the legislature and the incorporators that these roads would be built. Any tax exemption granted was done as the consideration for the construction of all these roads. Had the road been built to the Tennessee River as provided, Athens would have been the railroad center of Georgia. Had the road to Eatonton been built as required by the charter, that town would not have been without a railroad for so many years. The corporation flagrantly violated the very terms for which it was created.

The sanctity of a contract is not guaranteed by the Federal Constitution where the complaining party has not complied with the condition imposed upon it by the contract.

Respectfully submitted,

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Madison, Georgia	A. F. Jenkins, Attorney, City of Madison, and Attorney for Town of Rutledge, Georgia.
Crawfordville, Georgia	Osgood O. Williams, Attorney for Taliaferro County.
Augusta, Georgia	J. F. Hardin, Attorney for Columbia County.
Augusta, Georgia	W. P. Congdon, Attorney for City of Augusta, Georgia. *Of Counsel Employed by Parties at Interest.*

APPENDIX

State of Georgia } In Superior Court of Richmond County
Richmond County } No. 6227

GEORGIA RAILROAD & BANKING COMPANY,
Appellant

vs.

CHARLES D. REDWINE, REVENUE COMMISSIONER,
Appellee

APPEAL FROM THE ASSESSMENT OF AD VALOREM TAXES AND DENIAL OF PROTEST.

ORDER

The above and foregoing stated case coming on to be heard, after both oral and written arguments by all parties were had, and after a careful and thorough study of all the questions involved, the Court makes the following observations and decision:

In rendering a decision in this case involving questions of such grave importance, the Court deems it fit and proper to set forth some fundamental principles upon which it is based so as to leave no doubt as to the meaning of this decision.

The State cannot be sued without its consent, or a waiver thereof; and no power has ever existed in the General Assembly of Georgia to part with or limit the essential prerogatives of sovereignty without the consent of the people, and the Attorney General has no such authority as to waive this immunity except by Legislative enactment. And judgments heretofore rendered in such suits without such authority cannot now be pleaded as binding on the State, either as res adjudicata, or as an estoppel. This is specially so when the State was not a party, had not consented to be a party, nor waived its immunity in said suits.

Therefore, the construction and adjudication of the rights under the Charter, and several amendments thereto, of the

Georgia Railroad & Banking Company are now open for consideration and decision. In order to determine all the rights of both parties in the case at bar, it is neressary to have an overall picture of all the Acts of the Legislature under the Constitution of 1798 by which said Corporation was created.

The Constitution of 1798 declared the territorial and jurisdictional rights of the citizens of Georgia, and defined and limited the powers of the Legislature to contract or alienate them only by their consent. All powers, duties and privileges of every agency of government are derived from the Constitution, and no Legislature has the right or power to contract, divest itself, or its successors, of any of the rights of sovereignty, especially its very life-blood—taxation, unless that power of disposition is given in clear, unequivocal, definite and certain terms by its Constitution, or by implication equally as clear. If one Legislature could contract and convey any one of the powers of sovereignty of the State so as to deny itself, and its successors, the free exercise of this power, all others might be so aliened, thus destroying and defeating the very object and purpose of Constitutional Government and depriving the people of their sovereignty without their consent.

No Legislature is presumed to have relinquished the State's sovereignty unless the intention so to do is definitely and clearly expressed, and if there is any reasonable doubt existing in regard to its relinquishment, such doubt is fatal to it, as all doubts are to be resolved against such presumption. Even where an exemption exists, it should be rigidly scrutinized and never permitted to extend either in scope or duration beyond those clearly and definitely expressed. All grants of powers and exemptions of powers to corporations are contained in their Charters and ought to be strictly construed and their obligations to be strictly performed.

It is stipulated in the case at Bar that the Corporation never constructed two branches of its road as required by

its Charter and amendments thereto, to-wit: one running from the main line to Eatonton, and the other running from Athens to some point on the Tennessee River.

The Legislature, by an Act approved December 21, 1833, incorporated the Georgia Railroad Company for and during a term of thirty-six years and provided certain rights and powers and duties in same, and among which were those contained in Section 15, about which there has been, and still is, much controversy as to its scope and duration of powers. Section 15 reads as follows:

> "The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: Provided, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its

Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

This Section will be later referred to in more detail.

The Legislature, by an Act approved December 18, 1835, provided, "That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company," stipulating who should be the officers of the new corporation until the next annual election thereafter. It granted to this new corporation the right to establish an additional enterprise (banking), for a period of twenty-five years, unless forfeited, and provided by Section 13 of said Act that the Act of 1833 shall remain in full force and effect "except where it conflicts with the provisions of this Act." Then follows Section 14, as follows:

"And be it further enacted, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficiency on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company."

It should be noted, however, that the Legislature had already, by an Act approved December 18, 1835, created the Georgia Railroad and Banking Company and transferred, by Section 14, "all the rights to property acquired by the Georgia Railroad Company"; then on December 22, 1835, just four days after, the Georgia Railroad Company was authorized to construct, build and erect a branch of

said railroad to Warrenton without the delay contemplated in the Charter, "or may authorize the same to be done by others;" thus showing that the Georgia Railroad Company was still seeking to build another road in the territory in which they had exclusive rights.

The aforesaid Sections 13 and 14 of said Act of the Legislature of 1835 is conspicuous by the very absence of any transfer or any attempt to assign any immunity from the Georgia Railroad Company to the new corporation (Georgia Railroad and Banking Company), with a new name, new parties and a new enterprise. However, by an Act of the Legislature in 1837, this new corporation was granted the privilege to construct a railroad from Madison to the State Railroad (Atlanta), under the same rights, powers and immunities as had been given to the Georgia Railroad Company in constructing its road from Augusta to Madison. Said privilege, "shall extend to and regulate the construction of said extended road . . . in the same manner and to the same extent and for the same purposes and uses as the same has been used and applied to the Georgia Railroad and its branch from Augusta to Madison," and specifically designated that "this authority is a privilege." "A privilege is never construed to be a contract, and can be withdrawn at the will of the Legislature."

Section 15 of the Act of 1833 is vague and uncertain. In said Section, the Legislature was dealing, as a whole, with certain definite periods of time from the passage of said Act, such as: six months period in which to obtain finances; a two-year period in which to begin work; a six-year period to complete it; a thirty-six-year period to make, keep up and use the railroad, and a seven-year period of complete tax exemption. The thirty-six year exclusive period was to begin at one and the same point of time as the seven-year tax exemption period was to begin, because the thirty-six year exclusive period was to begin when one of the railroads was "completed for transportation," and the taxation period

"was to begin from and after the completion of any one of them (said railroads)."

And now we come to that clause about which there is so much controversy as to its meaning, "The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

Unquestionably the words "and after that" would mean a period of time beginning after the expiration of the seven year tax exemption period. The meaning as to when in point of time and for how long the method of taxing the stock at "one-half of one per cent." shall extend, is the very crux of the controversy, and if you treat the language "and after that" as a part of a contract in Section 15, it would be necessary to declare it void for uncertainty, and the prohibition as to the impairment of contracts would not apply in the construction thereof. The fairest and most reasonable construction to be placed upon said Section is that the thirty-six year "exclusive period to make, keep up and use the Railroads and transportations" can be and does mean an all "inclusive period" as used in regard to taxation. It would be unthinkable to construe the words "and after that" (the seven year tax exemption period) to mean for the remainder of eternity binding all posterity and its Legislatures. If the Legislature had intended for it to have extended beyond the thirty-six year period, there were ample words of clear, definite, unequivocal and unmistakable meaning, with which to have expressed themselves on such a grave and important question. This is especially so since the Constitution of 1798 forbade the Legislature from passing a law repugnant to it and to limit its powers to contract or alien the rights of the citizens without their consent. If the Legislature had intended to have granted the said corporation a limited rate of taxation for the remainder of eternity, why deal in certain and definite periods of time in regard to everything

else it could do under its Charter, including a part of the "taxation" period, and then use a sentence with a clause couched in such indefinite, uncertain and vague language as to another very important and substantial right claimed under the Charter, when for the first time throughout its Charter the subject of taxation was referred to, and if the Legislature so meant said words to have such meaning, it would have stated so, for "no rights are taken from the people or given to a corporation beyond those which the words of the Charter, by their natural and proper construction, purport to convey."

For the purpose of throwing light on the construction of said Section, we find on page 307 of Prince's Digest of Georgia Laws (2nd Edition), published in 1837, on the margin of this Section, these words: "Term of Charter, 36 years."

To make the construction and meaning of said Section 15 clear, the Court may best do so by the use of a very simple and homely illustration: Suppose "A," the owner of a large tract of land, leases the "exclusive rights" to "B" for a term of thirty-six months, to begin on the first of the year after certain improvement had been completed, and then provide rights in regard to the improvements after the expiration of the lease by a new agreement. Then for the first and only time that the question of rent is mentioned and referred to, is that "B" shall have his rent free for the first seven months beginning on the first of the year; "and after that" shall be subject to a rent not exceeding a percentage of the net earnings. Under such language, it would be unthinkable to construe that "B" would be liable for the stipulated rent for the remainder of his existence, rather than for the remainder of the thirty-six months expressed in the lease.

In further determining what the Legislature meant as regards the powers of taxation over this company's property, we find in an Act approved December 20, 1849 with the right to the Georgia Railroad and Banking Company

to increase its stock and build the Washington branch, with this proviso: "That the amount of the increased stock of said company shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th Section of the Charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose." Surely the words "shall not be exempted from taxation" as used were referring to the "seven year tax exemption" and was not granting said corporation complete tax exemption for any period, and definitely stated that the Legislature might impose any other method of taxation.

Then, by an Act of the Legislature, approved February 1, 1850, as a Supplement to the General Tax Laws of Georgia it was provided that taxation on certain increased capital of said Georgia Railroad and Banking Company "no banking capital of said Company shall be exempt from future taxation; at the discretion of the Legislature, and the tax on net profits only be on the net profits of the Railroad." Thus, clearly showing that said Corporation recognized the power of the State to impose a different tax and it was extending the same period of taxation as to the Railroad stock as had been provided in the Act of 1833.

Then, by an Act approved December 11, 1858, the Legislature provided for an increase of capital stock and stated "That such additional stock shall be subject to such rate of taxation as the Legislature may assess upon the property of the people of this State," and this reserve right . . . under this Act in no case or under any circumstances to be construed to authorize any increase rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act," all of which was done well within the thirty-six year period.

Surely if said Corporation had thought it possessed an irrevocable contract as to the one-half of one per cent. taxation, they most certainly would not have asked for a continuation of this rate of taxation.

Almost immediately, after the termination of the thirty-

six year period, the people of Georgia adopted a new Constitution in 1877, which declared that all tax exemptions heretofore granted to be null and void, and also the people of Georgia, in their Constitution of 1945, declared that such exemptions that may have heretofore existed shall be null and void. It provided that taxation on all like property shall bear the same rate of taxation.

Hence, we are driven to the one and only logical conclusion that there is not now, nor ever was an irrevocable contract or agreement that said Railroad Company would forever enjoy a limited tax of one-half of one per cent. on its net earnings, and the people were well within their rights to withdraw such special privileges that may have been given to either of said corporations, as was done by the Constitution heretofore referred to.

THEREFORE, it is considered, ordered and adjudged by the Court, that the protest, together with the amendments thereto, set forth no valid reason why said Revenue Commissioner should not proceed to the collection of taxes as provided by law, and that the general demurrers of said Commissioner are hereby sustained, and the protest is hereby dismissed.

This 5th day of March, 1951.

G. C. ANDERSON
J.S.C.A.C.

I, Victor Davidson, Special Attorney for Intervenors, Amici Curiae, certify that I have this day served a copy of the within brief on Hon. Eugene Cook, Attorney General of Georgia, Counsel for Appellee, and on Hon. Robert B. Troutman, Hon. Furman Smith, and Spalding, Sibley, Troutman & Kelly, Counsel for Appellant, by mailing copies of same to their addresses.

This_____day of November, 1951.

VICTOR DAVIDSON
Special Counsel for Intervenors,
Amici Curiae